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No. 802.

In the Supreme Court of the United States

OCTOBER TERM, 1913.

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v.

EDWIN GEARLDS, L. J. KRAMMER, FRED E. BRINKMAN, ET AL.

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STATEMENT OF THE CASE.

This case is here on direct appeal from the United States District Court for Minnesota and from a decree rendered April 20, 1912—upon an amended bill (R., 43–65) and reamended answer (R., 66–72)—whereby appellants, who were special officers of the Indian Bureau of the Interior Department, were enjoined from interfering with the saloons of the several complainants located in the city of Bemidji, Beltrami County, Minn.; and from interfering with

the conduct, in each of said saloons, of a retail liquor business with persons of Indian blood.

The amended bill—really a second amended bill—in substance avers: That each of the twelve complainants was running a saloon and carrying on therein a retail liquor business, at a specific location in Bemidji, under an unexpired retail liquor license, duly issued by the Federal revenue authorities, to cover a period from July 1, 1910, to June 21, 1911, and under further license issued, under authority of the State, by the municipal authorities of said city (R., 43–50). That each complainant had refrained from selling liquor to Indians or persons of Indian blood, and had fully complied with all of the laws, Federal and State, regarding the liquor traffic with Indians or otherwise. That irreparable injury would result to the business of each if the threatened acts of defendants should be done, and complainants join to avoid multiplicity of suits. That Beltrami County has existed since 1897; that Bemidji, its county seat, was organized under a village form of government in 1898, and in its growth since, has developed into a city of substantial buildings, public and private, with five railroads, waterworks, and electric-light plant. It has seven thousand inhabitants, and taxable property assessed at over $1,600,000. That within the territory ceded by the treaty of 1855 (*infra*) there was in 1909 property assessed at over $93,000,000, one hundred smaller towns, and a multitude of farms, and the whole area

is now inhabited solely by white people, save Indian allottees and their children. That the latter for several years past have all been full-fledged citizens of the United States and entitled to all the rights, privileges, and immunities thereof (R., 53). That none of said Indians recognize any tribal relation with each other or with other Indians; that no Indian reservation remains. That all the land has been allotted or ceded to, and sold by the United States, save not exceeding 160 acres in the old White Earth Agency, 600 acres in the old Leech Lake Agency, 80 acres north of Cass Lake, and 200 acres in Bena, on which several acreages are old agency and Indian school buildings, or both. That the White Earth and Leech Lake Agencies are occupied by a superintendent of Indian schools and a disbursing agent, and are more than forty miles distant from Bemidji. That since said allotments Indian agents have had practically no powers or duties save to supervise school affairs and disburse annuities. That Indians rarely visit Bemidji, and then only in small numbers during the berrying season. That no Indians live anywhere within twenty miles outwardly from Bemidji, and the Indian title to all lands within Bemidji has been fully extinguished. That in all of said territory the governing jurisdiction of the State has been complete since 1867, and that since then the State law has made the sale of liquor to persons of Indian blood a felony (R., 51–54); that on February 22, 1855, a tribe

of Indians known as Chippewas, comprising three bands, possessing lands in the then territory of Minnesota, by treaty ceded to the United States all lands claimed by them north of a line near the 46th parallel, save certain scattered reservations. (For article 7 of said treaty, see statutes and treaties, *infra*.) That defendants, claiming to act under authority of this treaty article and sections 2139 and 2140 of the Revised Statutes, and amendments thereto, entered into duly licensed saloons in many towns, including six county seats within said ceded territory, and either destroyed the stock or forced its shipment to a point outside of said ceded territory. And on December 9, 1910, they ordered complainants and 20 other saloon keepers in Bemidji to close their saloons and cease sales of liquor, and ship out their stock; and threaten to and, unless this order be obeyed, will destroy complainants' stock and fixtures, and close and ruin their businesses, and cause their arrest for alleged unlawful introduction and sale of liquor in Indian country. That in the 55 years following the treaty of 1855 no effort was made by State or Federal authorities to prevent the liquor traffic in said ceded territory; and licenses to sell were always granted outside of said reservations; and the United States always accepted specific liquor taxes authorizing the business (R., 55–57). That by a treaty concluded May 7, 1864, and ratified March 20, 1865, in consideration of the further cession to it by said Indians of lands reserved to them in the treaty of 1855, there was set apart as a future home for *part* of said Indians

an area which included all lands in and for several miles around Bemidji. That on April 8, 1867, by treaty between the United States and the *last-named Indians*, they were given a new reservation of thirty-six (36) townships and ceded to the United States all the balance of their lands in Minnesota, including all lands within and near Bemidji, thus re-selling them in 1867, without any restrictions whatever as to the liquor traffic, and because thereof, neither article 7 of the treaty of 1855 nor any liquor statute referred to has been operative as to said lands since 1867 (R., 58–61). That under the act of January 14, 1889 (25 Stat. 742), the President appointed commissioners who made agreements with said Indians to cede all of said seven named reservations and part of the White Earth and Red Lake Reservations, which agreements were approved by the President, and thus operated under said act, to completely extinguish the Indian title to said lands. That save a portion in the Red Lake Reservation all the territory included in the treaty of 1855 has been opened to civilized settlement and become populated by white people who have organized political divisions under State laws, established varied industries and commercial interests, and in 1910 the whole population in said ceded territory numbered over 380,000. That the Government officers admit that in a strip of land between Bemidji and the Red Lake Reservation, about 15 miles wide, liquor may lawfully be sold; and, as a result, for six years past seven

saloons have operated in said strip. And that the Indians residing on the Red Lake Reservation in order to reach Bemidji must cross the strip; and if traveling by rail must pass either two or four saloons in so doing (R., 62–64). The bill waives answer under oath (R.,64).

The answer admits the jurisdictional amount, residence of complainants, and conduct of the licensed retail liquor and saloon business in Bemidji, as alleged. It denies that complainants have at all complied with the Federal Indian liquor-traffic laws, and avers that in violation of said article 7 and said United States Statutes, they introduced liquor into Bemidji, which is an Indian country. It admits that since 1867 the Internal Revenue Bureau has issued receipts for retail liquor business in said territory (R., 66–67). It admits the conditions in the said territory to be as described in the bill so far as growth, railroad construction, white settlement, building, property values, and municipal organization is concerned, and that all lands ceded by the treaty of 1867 have since been public lands of the United States. It further avers that on each, the White Earth and Leech Lake Reservations, set apart by said treaties, an agency is maintained to supervise the affairs of said Indians and pay the annuities, and that there is also a superintendent and special disbursing agent with offices and a number of clerks, as well as Indian schools; that at the White Earth Agency 5,600 Indians are carried on the annuity

rolls, and at Leech Lake 1,750 Indians are so carried; and that a majority of all those Indians reside on lands embraced within said reservations which were reserved by the treaty of 1855. It admits that, *in consequence of* the elevation of these Indians to citizenship, by operation of the general allotment act of 1887, a recital judicially known to this court to be partly incorrect, the tribal relations and government thereof have ceased (R., 67), *except* as they have been necessarily continued by these facts, viz: That in 1908, 1909, and 1910 Congress appropriated from tribal funds to the executive committee of the White Earth Band of Chippewas; that two Indian agents are maintained by the United States among these Indians, one at the White Earth Agency and one at the Leech Lake Agency; and their duties and powers are prescribed by chapter 1, title 28, Revised Statutes, and the Regulations of the Indian Office of 1904; that the United States also maintains, for the education and civilization of these Indians, three boarding schools on the Leech Lake Reservation, nine boarding schools on the White Earth Reservation, with a total average daily attendance of 459 pupils; and that the Leech Lake agent and all of the schools are maintained from funds created by section 7 of the act of January 14, 1889 (25 Stat. 645); that all of these instrumentalities for civilization are maintained by the United States in the discharge of its duties toward these Indian wards; and that the White Earth agent is paid from the appropriation

for the support of the "Chippewas of the Mississippi" under the act of March 3, 1911 (36 Stat. 276). That no moneys are now paid said Indians under any provision of the treaty of 1855, but are paid under subsequent treaties and acts of Congress. (R., 68.)

For the purposes of this suit the answer admits that the Indians residing on and occupying the land ceded in 1855, including the White Earth and Leech Lake Reservations, are, generally speaking, either allottees under the general act of 1887 or the act of January 14, 1889, or descendants of such allottees; and that said reservations are principally allotted to Indians, and a large part of the White Earth Reservation is now owned in fee by white men and Indians, and, as to its lands, conditions are substantially as set forth in the bill (R., 68–69).

That all of said Indians are either those, or the descendants of those, who were parties to the treaty of 1855 and the later treaties aforesaid; and that the condition in the 15-mile strip is as set forth in the bill. It avers that in hunting, trapping, and for business and pleasure, said Indians traverse parts of the region comprised in the treaty of 1855 and thus visit the towns and cities therein, including Bemidji, where intoxicating liquors are sold at retail under State statutes, which laws also make sales to persons of Indian blood a crime; and that none of the treaties of cession or acts of Congress since 1855 have at all modified article 7 of that treaty or any of the acts of Congress prohibiting the introduction of

liquor into the ceded territory. It admits the failure to enforce article 7 between 1867 and January 17, 1909, save it avers that in 1905 one Hugh Funk was prosecuted for a violation of said article and statutes in introducing liquor into Ball Club village within said ceded area (R., 69–70); that defendant Johnson, as chief special officer of the United States Indian Service, on September 17, 1909, issued an order that said article 7 would be enforced in all of Cass County north of township 138 north, and warned all liquor dealers to close and remove their stocks before October 17, 1909; that on November 29, 1909, he issued a like order and warning as to all of Becker and Hubbard Counties and parts of Itasca, Norman, Polk, and Clearwater Counties, and on January 15, 1910, he published a list of railway stations within said ceded area in which the United States was endeavoring to enforce said article 7; and on April 8, 1910, he gave notice that article 7 would be enforced throughout all of Becker, Hubbard, and Mahnomen Counties, and parts of Beltrami, Cass, Crow Wing, Ottertail, Wade[illegible], Clearwater, Itasca, and Norman Counties; and that all these orders and acts, including those referred to in the bill, were by direction of the Commissioner of Indian Affairs; and that in the enforcement of these orders, 275 saloons had been closed and 6 saloon keepers indicted and 1,300 gallons of whisky destroyed. The answer further admits that all things required to be done by either the United States or its President or the

various bands of Indians concerned under the acts of January 14, 1889, or April 28, 1904, to make such acts operative, were done; and that the Indian title to all lands mentioned therein became completely extinct except that some of the allotments are still being held for the benefit of some of the Indians. It avers that everything defendants did was done in the line of official duty as special officers of the United States for the suppression of liquor traffic among Indians; that they have no purpose to do more or less than their duty; and that Bemidji is within the Indian country, within the operation of the treaty of 1855 and the laws of the United States (R., 70–71).

The parties then filed a written stipulation that the cause be set down for hearing on said reamended bill and answer "without further pleadings or proceedings and a decree be rendered on said bill and answer." On April 20, 1912, decree was rendered, to which the defendants duly excepted (R., 72–73).

TREATIES AND STATUTES.

On February 22, 1855 (10 Stat. 1165), the Chippewas of the Mississippi, the Pillager Chippewas, and the Lake Winnibigoshish Chippewas jointly executed a treaty with the United States (the Mississippi Chippewas executing it by their separate representatives), whereby they jointly ceded from the general "Chippewa country as established by the treaty of July 29, 1837," an area described by natural boundaries and

within the then Territory of Minnesota, and further ceded all lands then claimed by them. Out of this area thus jointly ceded there was reserved in severalty certain scattered tracts for the Mississippi Chippewas as well as three separate tracts for the Pillager and Lake Winnibigoshish Bands. Article 7 of this treaty provided:

> The laws which have been or may be enacted by Congress regulating trade and intercourse with the Indian tribes to continue and be in force within and upon the several reservations provided for herein, and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in ardent spirits, wines, or other liquors in the Indian country shall continue to be in force, within the entire boundaries of the country herein ceded to the United States until otherwise provided by Congress.

Annuities provided by the treaty were payable for twenty years thereafter, viz, until 1875, and were so paid.

On February 25, 1857 (11 Stat. 166), Congress passed an enabling act to authorize the framing of a constitution and the taking of "all necessary steps for the establishment of a State government in conformity with the Federal Constitution, to the end that Minnesota might be admitted as a State" on an equal footing with the original States. And on May 11, 1858 (11 Stat. 285), an act was passed which, after reciting the steps taken under the first-named act,

including the furnishing of a State constitution, admitted Minnesota into the Union "on an equal footing with the original States in all respects whatever."

On March 11, 1863 (12 Stat. 1249), the same tribes who were parties to the treaty of 1855 ceded to the United States the several scattered tracts which had been reserved in the first-named treaty in severalty for the Chippewas of the Mississippi; and a new separate reservation was therein set apart for the Chippewas of the Mississippi, which new reservation was a part of the lands originally ceded to the United States in 1855. This treaty, as well as the appropriation acts of Congress and Executive orders of November 4, 1873, and May 26, 1874 (Ex. Ord. Ind. Res. 86–88), recognized the then existence of the treaty of 1855.

On May 7, 1864 (13 Stat. 693), a treaty was executed between the same three tribes and the Government, which virtually replaced the treaty of 1863. It ceded to the United States the same scattered tracts that were ceded in the treaty of 1863, and reserved in turn as a home for the Mississippi Band an area slightly different in boundary from that reserved in the treaty of 1863. The land so set apart for the Mississippi Band is alleged in the bill and admitted in the answer to include the city of Bemidji, and was a part of the land originally ceded to the United States in the treaty of 1855. This treaty was not ratified till 1865, and will be referred to hereinafter as the treaty of that date.

On March 19, 1867 (16 Stat. 719), the Mississippi Band of the Chippewas, *acting alone* and by treaty, ceded all (save a smaller portion still reserved) of the lands reserved to them by the treaty of 1865; and this re-ceded portion includes the land on which Bemidji is located. By article 4 the existence of the treaty of 1855 was recognized. For the convenience of the court a map is appended to this brief showing the various tracts ceded by the above treaties, as well as the several Indian reservations, within and adjacent to the territory covered by article 7 of the treaty of 1855.

Each of these treaties was regularly recommended by the Senate for approval, and approved by the President.

On January 14, 1889 (25 Stat. 642), Congress passed "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," providing for commissioners who should negotiate with all the bands or tribes of the Chippewas in the State, for the complete cession of all their title to all the reservations in the State except the White Earth and Leech Lake Reservations, and to all of the latter not required to fill allotments; with provisions for allotments within these reservations to the Indians on the Leech Lake Reservation and to all other bands upon the White Earth Reservation, all allotments to be made in conformity with the general act of February 8, 1887. Under this act and an act amendatory thereof of April 28, 1904 (33 Stat. 539), an agreement

was made with these Indians on July 29, 1889 (H. R. Ex. Doc. No. 246, 51st Cong., 1st sess., 34–36). The history of the allotments under these acts and their effect upon the status of the Indians involved will be detailed at a suitable point in the argument.

ASSIGNMENTS OF ERROR.

I. The court erred in its order granting a temporary injunction as prayed in plaintiffs' bill of complaint.

II. The court erred in adjudging and decreeing that the temporary injunction be made permanent.

III. The court erred in the entry of the final decree in the above-entitled cause.

IV. The court erred in making and entering a decree restraining the defendants and appellants from proceeding in the discharge of their duties as set forth in their answer herein.

V. The court erred in decreeing that the city of Bemidji, mentioned in the complainants' bill of complaint, was not subject to the restrictions provided for in said article 7 of the treaty of 1855.

VI. The court erred in not entering a decree herein dismissing the complainants' bill of complaint.

ARGUMENT.

In support of our argument that the judgment of the circuit court should be reversed we maintain two propositions. First, this court has jurisdiction to hear this direct appeal, and, second, article 7 of the treaty of 1855 was in force at the time of the acts complained of in the bill.

I.

THE JURISDICTION.

THIS COURT HAS JURISDICTION TO HEAR THIS DIRECT APPEAL.

Section 238 of the Judicial Code, under which the appeal is taken, provides:

> Appeals * * * may be taken from the district courts * * * to the Supreme Court in the following cases:
>
> Any case that involves the construction or application of the Constitution of the United States;
>
> In any case in which * * * the validity or construction of any treaty made under its authority is drawn in question.

It should be observed at the outset that this is not an appeal from the order of January 10, 1911, overruling the demurrer and granting a temporary injunction, in support of which the opinion of Judge Willard, of January 13, 1911, was delivered. It is an appeal from the final order of April 20, 1912, by which the temporary injunction was made permanent (R., 73–74). No opinion was delivered upon this order, nor are the grounds upon which it was based anywhere stated. Considering the opinion upon the demurrer, however, in connection with the pleadings as they appeared upon the final submission, it is apparent that at least three questions must then have been presented to the court for decision, viz: (1) Was article 7 of the treaty of 1855 impliedly repealed by

the Minnesota enabling act? (2) Did the power of Congress to regulate commerce with Indian tribes survive the admission of Minnesota to statehood in the absence of an express reservation to this effect? (3) Was article 7 of the treaty of 1855 repealed by the subsequent treaties of 1865 and 1867?

Upon this state of the record this court has jurisdiction to hear the direct appeal on three grounds:

(1) The construction or validity of article 7 of the treaty of 1855 is drawn in question.

(2) The construction or application of the Constitution is involved.

(3) The construction of the treaties of 1865 and 1867 is drawn in question.

(1) In *United States* v. *Wright* (229 U. S. 226), the defendant demurred to an indictment charging him with introducing liquor into the Indian Territory in violation of the act of January 30, 1897 (29 Stat. 506). The demurrer was sustained on the ground that the above act was impliedly repealed by the Oklahoma enabling act, and the Government brought the case here under the Criminal Appeals Act, claiming that the invalidity or construction of the act of 1897 was involved. This court sustained its jurisdiction to hear the appeal in the following language (p. 228):

> The criminal appeals act, March 2, 1907 (chap. 2564, 34 Stat., 1246), provides for a writ of error, to be taken by the United States from the district court direct to this court, from a decision or judgment sustaining a demurrer to an

indictment, "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." The present case is clearly within this act, as previously interpreted and applied. (Citing cases.)

As the Criminal Appeals Act requires that the decision be "based on the invalidity or construction of the statute *upon which the indictment is founded,*" it follows that jurisdiction in the *Wright* case must have been sustained on the ground that the construction or invalidity of the act of 1897 was involved. If, therefore, a decision to the effect that one statute impliedly repeals another involves the construction or invalidity of the earlier statute, the same must be true of a decision to the effect that a statute repeals an earlier treaty, since treaties and statutes are equally repealable. (*Ex parte Webb*, 225 U. S. 663; *The Cherokee Tobacco*, 11 Wall. 616). And where the construction or validity of a treaty is drawn in question, the fact that the construction of a statute is also involved does not affect this court's jurisdiction. (*Petit* v. *Walshe*, 194 U. S. 216; *Altman & Co.* v. *United States*, 224 U. S. 583.)

But aside from the *Wright* case, there is no doubt that this is a case in which "the validity of a treaty" is drawn in question within the meaning of section 238. "Validity" is a broader term than "constitutionality," which appears in the same section. Indeed, in the language of this court, "the validity of a statute of the United States * * * is drawn in question when

the *existence* or constitutionality or legality of such law is denied." (*Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 451.) Moreover, "validity" has a particularly comprehensive meaning as applied to treaties. (*Jones* v. *Walker* (C. C. Va.), 2 Paine 288.) In that case, Mr. Chief Justice Jay, of this court, sitting at circuit, said (pp. 695, 696):

> The twenty-sixth section of the judicial act (1 Stat. 87) recognizes its [the judiciary's] power to determine cases where is drawn into question the validities of treaties. Perhaps it may tend to elucidate the subject if we were to consider "validity" applied to treaties as admitting of two descriptions, viz, "necessary" and "voluntary." By "necessary validity" I mean that which results from the treaty's having been made by persons authorized by, and for purposes consistent with, the Constitution. To this kind of validity all such questions as these relate, viz, Has the treaty been made and ratified by the President, by the advice and consent of three-fourths of the Senators present? *Is it temporary, and has it expired? Is it perpetual?* Had it been dissolved with mutual agreement? *Has it been annulled and declared to be void by the Nation, or by those to whom the Nation has committed that power?* Does it contain articles repugnant to the Constitution? Are those articles void? Do they vitiate the whole treaty?

If, therefore, the expression "validity of a treaty" is equivalent to existence of a treaty, the present case is within section 238, inasmuch as it concededly

involves the question whether article 7 of the treaty of 1855 is still in existence or has been repealed.

(2) The enabling act did not expressly repeal article 7 of the treaty of 1855; in fact, it contained no reference to Indians whatsoever, and the question below, therefore, was one of implied repeal, the determination of which involved not only a construction of the treaty and the act, but also a consideration of the respective spheres of Federal and State regulation. The power of Congress in the premises is derived from the commerce clause of the Constitution, which grants to that body power to regulate commerce among the Indian tribes; that of the State is derived from the inherent right in all sovereignties to enact police regulations within their borders. In the absence of an express reservation in favor of Congress in the enabling act the question was which power should prevail in the resulting conflict, or, in other words, is the power of Congress broad enough to survive the creation of a State out of territory in which Indians are situated? The construction of the Constitution was thus involved within the meaning of section 238.

In *United States* v. *43 Gallons of Whisky* (93 U. S. 188), *Dick.* v. *United States* (208 U. S. 340), and *Perrin* v. *United States* (232 U. S. 478), treaty provisions similar to that under consideration were upheld. These provisions, like that in the case at bar, were adopted to preserve the application of the Federal liquor laws to lands which were about

to lose their character as Indian country by reason of the extinguishment of the Indian title thereto. The only distinction between those cases and this one is that in the former the treaties were made *after* the Territories in which the ceded lands were situated had been admitted to statehood, while in the present case the treaty came *before* the enabling act. But if Congress can retain control over ceded lands which are *already* within the boundaries of a State, *a fortiori* can it do so *before* such lands become part of a State, when its power in the premises is derived not only from the commerce clause but also from that provision of the Constitution which gives to Congress power over Territories and other property of the United States. The only effect of a subsequent enabling act is to remove the second ground from the power derived, leaving it dependent upon the commerce clause alone, which is precisely the situation when the treaty comes *after* statehood. The *Whisky*, *Dick* and *Perrin* cases, *supra*, are therefore indistinguishable on this point from the case at bar, and if they involved a construction of the Constitution the same must be true of the present case.

In the *Perrin* case, *supra*, the nature of the question involved was essentially constitutional, as appears from the following passage from the opinion (p. 483):

> Whether this power to protect the Government's Indian wards against the evils of intemperance, of which they are easy victims, is sufficiently comprehensive to enable Congress, when securing the cession of part of an Indian

> reservation within a State, to prohibit the sale of intoxicants upon the ceded lands, if in its judgment that is reasonably essential to the protection of the Indians residing upon the unceded lands, is the real question presented by the first of the defendant's objections. We say it is the real question, because if Congress possesses power to do this it follows that the *State possesses no exclusive control* over the subject and that the congressional prohibition is supreme.

And in the same case the *Whisky* and *Dick* cases were thus reviewed by the court (pp. 483–485):

> The case of *United States* v. *Forty-three gallons of Whisky* (93 U. S. 188), arose out of a treaty with the Chippewas in 1863 (13 Stat. 668), wherein a considerable portion of the reservation in the State of Minnesota was ceded to the United States. The treaty contained a stipulation that the laws of the United States, then in force or thereafter enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country should be operative throughout the ceded lands until Congress or the President should direct otherwise, and the principal question in the case was whether this stipulation *encroached upon the power of the State and upon its equal footing with the original States.* This court upheld the stipulation, and in the course of the opinion * * *, said:
>
> This stipulation was not only reasonable in itself, but was justly due from a strong Government to a weak people it had engaged to pro-

tect. * * * Based as it is exclusively on the Federal authority over the *subject matter* there is no disturbance of the principle of State equality.

The case of *Dick* v. *United States* (208 U. S. 340) is even more in point. There the Nez Perce tribe, by an agreement ratified by Congress, had ceded to the United States a large portion of their reservation in the State of Idaho, and in the agreement was a stipulation subjecting the ceded lands, for a period of 25 years, to the Federal laws prohibiting the introduction of intoxicants into the Indian country. The major part of the unceded lands was allotted in severalty to members of the tribe under the acts of 1887 and 1891, *supra*, and the ceded lands were opened to disposition under the public-land laws. In regular course some of the ceded lands were patented to white men and came to be the site of a town. Under the stipulation Dick was prosecuted for introducing intoxicating liquors into the town, and was convicted; whereupon he brought the judgment here for review, his chief contention being that in view of *Idaho's position as a State* Congress *was without constitutional power* to authorize or ratify the stipulation. Upon full consideration this court affirmed the judgment, and, following *United States* v. *Forty-three Gallons of Whisky, supra*, and other cases, held that the stipulation was a valid regulation and not subject to objection on constitutional grounds.

An examination of the opinion of the court below on the demurrer discloses that although the decision was expressed in terms of an implied repeal, the real ground upon which is was based was that the power of Congress over Indians is not sufficiently broad to extend to ceded Indian lands within a State. It was held that the enabling act repealed the treaty of 1855, not on account of any particular provision therein, but simply because it created a sovereign State whose police power was supreme over all lands within its borders. This is made clear from the following passage in the opinion (R., 38, 41):

> The question is, Where is the power to regulate? Does the United States Government have the power to regulate the sale of intoxicating liquors in this district, or does the State of Minnesota have that power? It was said *In the matter of Heff* (197 U. S. 488) that there could be no divided authority. If the United States Government has the power to regulate it, that power must come in conflict with the power of the State to regulate it.
>
> I can come to only one conclusion in the case, and that is that the provision in article 7 of the treaty of 1855, which prohibited the introduction of intoxicating liquors into the ceded country, was repealed by the act admitting Minnesota into the Union.

In other words, it was held that the admission of Minnesota to statehood created a conflict between Federal and State police powers, and that the latter prevailed because there was no provision otherwise in the enabling act. This was nothing more or less

than a construction of the *commerce clause* adversely to the contention of the appellants.

The present case, therefore, is one involving the construction or application of the Constitution in which a direct appeal lies to this court under section 238.

(3) It may not be denied that the question whether the treaties of 1865 and 1867 repealed article 7 of the treaty of 1855 involves the construction of a treaty. This question, however, was not decided by the court in its opinion upon the demurrer (R., 41), and it will undoubtedly be argued that for this reason the present appeal will not lie on this ground. But, as emphasized at the outset, this is *not* an appeal *from the decision on the demurrer;* and there being no written opinion upon the case as finally submitted, it is impossible to assert with any degree of certainty what was *not* decided at that time. Whether the treaty of 1855 was repealed by the later treaties would necessarily have been passed on next, if the decision as to the effect of the enabling act had been the other way. For aught that appears in the record, the court may have changed its position entirely upon the final hearing, and held that while the enabling act did not repeal the treaty of 1855, the later treaties did. In any event, the fact that the court refused to pass on the question at one stage of the proceedings is certainly not conclusive that it did not do so at another.

But assuming that the question was never passed on, the construction of the later treaties was never-

theless drawn in question within the meaning of section 238. That section, unlike section 237 and the Criminal Appeals Act, does not require a decision on the point by the court below. As long as the question was properly presented by the pleadings so that the lower court *could* have decided it if it had chosen to do so, an appeal will lie under section 238.

Muse v. *Arlington Hotel Co.* (168 U. S. 435).
Cornell v. *Green* (163 U. S. 75).
Holder v. *Aultman* (169 U. S. 81).
Loeb v. *Township* (179 U. S. 472).

The record shows that the treaties of 1865 and 1867 and their alleged effect on the treaty of 1855 were specifically pleaded in the amended bill (R., 57–61), and that issue was taken thereon in the amended answer as follows (R., 69):

> These defendants deny that the several acts of Congress and treaties mentioned in said bill, and which were enacted and promulgated subsequent to said treaty of 1855, repealed or in any wise modified said article 7 of said treaty of 1855, prohibiting the introduction of intoxicating liquor into the territory thereby ceded, and aver that none of said laws and treaties, or any law or treaty enacted by Congress or promulgated by the President of the United States, has repealed, modified, changed, or weakened the force and effect of said article 7 and the laws of the United States prohibiting the introduction of intoxicating liquor into said ceded territory, which these defendants allege is by virtue thereof Indian country.

Under these circumstances, the fact that the court below may not have decided the question does not take the case out of the operation of section 238, for clearly a circuit court can not oust this court of its appellate jurisdiction by deciding (and in this instance erroneously deciding) but one of the questions which were properly presented to it by the pleadings.

II.

THE MERITS.

ARTICLE 7 OF THE TREATY OF 1855 WAS IN FORCE AT THE TIME OF THE ACTS COMPLAINED OF IN THE BILL.

No claim is made that article 7 of the treaty of 1855 was beyond the constitutional limits of the treaty-making power at the time it was made; nor that it does not cover the *locus in quo* in the present case. What is contended is, that the article is no longer in force, and was not in force at the time the acts complained of are alleged to have been committed; and no less than three causes are assigned as having done away with it. We maintain that none of these causes has had the effect contended for.

(1) Article 7 of the treaty of 1855 was not repealed by the Minnesota enabling act, nor by the act admitting that State into the Union.

Two years after the treaty of 1855 was ratified Congress passed the Minnesota enabling act (11 Stat. 166). It contained no reference whatever to Indians, nor to the previous treaty, and it is argued that

from these omissions an intention to repeal article 7 may be implied. But as will be pointed out *infra*, it was not necessary for Congress to expressly declare in the enabling act that the article should continue in force after statehood; and when it is remembered that the need for the prohibition must have been fully as great in 1857 as in 1855, it is impossible to attribute to Congress any such rapid change of policy. Certainly it is fair to suppose that if such a change had been intended it would have been expressed in more certain terms. Moreover, the decisions of this court in *Ex parte Webb, supra*, and *United States* v. *Wright, supra*, handed down during the pendency of this appeal, leave no room for doubt on the subject. It is true that the Oklahoma enabling act, which was involved in thoses cases, contained a provision that nothing in the State constitution should be construed to limit or impair the rights of person or property of the Indians of the Indian Territory or to limit the authority of the United States to make any law respecting such Indians which it would have been competent to make if the act had never been passed; but on the other hand, it also provided that the constitution of the proposed State should prohibit the introduction, etc., of liquor into the Indian Territory, and, in spite of this broad delegation of authority to the future State, it was held in the *Webb* case that the enabling act did not repeal the act of 1895 in so far as it forbids the interstate introduction of liquor into the Indian Territory, and in the *Wright* case that

it did not repeal the act of 1897, which forbids *any* introduction of liquor into the Indian country as such. Certainly, as regards the latter act, there was at least an apparent inconsistency between its continued existence and the provision in the enabling act authorizing the State to deal with the introduction of liquor into the Indian Territory; yet it was held in the *Wright* case that the duty of the Federal Government to protect the Indians from the use of intoxicants is so strong that an intention to entirely delegate that duty to a State can not be implied in the absence of unequivocal language. Or as it was put by the court in that case (p. 238):

> The liquor prohibition, so far as it concerns the Indians, has always been deemed one of the peculiar responsibilities of the Government at Washington, and it may easily be believed that Congress felt reluctant to delegate the subject matter wholly to the State government that was about to be established in the Indian Territory; especially as the same subject matter in other States remained, as it still remains, under Federal control.

Here there is no inconsistency whatever between the provisions of article 7 and the enabling act, and certainly it can not be maintained in the face of these two cases that the mere omission in the later act to refer to an existing treaty prohibiting the liquor traffic with the Indians is a sufficient reason for holding that it has been repealed.

By the act of May 11, 1858 (11 Stat. 285), Minnesota was admitted to the Union "on an equal footing

with the original States in all respects whatever." The real ground of the decision below on the demurrer seems to have been that the admission of Minnesota to equal statehood was in itself inconsistent with the continued existence of article 7, the theory being that the condition of statehood carries with it supreme police power over the entire State, to the exclusion of any Federal power within the same limits.

The fallacy of this position lies in its failure to grasp the fundamental principle that the regulation of commerce with Indian tribes, as well as that with foreign nations and between the several States, is a subject of exclusive Federal control, and that the States, at least when Congress has acted, have no power whatever over such subjects. By applying this principle of exclusive control over the subject matter, it has been frequently held that Congress may by treaty or statute forbid the introduction of liquor into ceded Indian lands which are within the jurisdiction of a previously created State. (*Perrin* v. *United States, supra; Dick* v. *United States, supra; United States* v. *43 Gallons of Whisky, supra.*) The only distinction between these cases and the present one is that in the former the cession and prohibition came after statehood, while in the latter they came before; and it was on this ground that the *Dick* and *Whisky* cases were regarded as not controlling by the court below. But this is a distinction without a difference. For if a prohibition is valid when made *after* statehood, it must be because such a prohibition is not incon-

sistent with the condition of statehood; and it follows irresistibly that the elevation to statehood of a Territory to which the prohibition originally applied is not at all inconsistent with the continued existence of that prohibition. The fact that the Territory becomes a State does not create any divided authority or conflict of authority over Indian matters between the Federal and State Governments, because the subject is one of *exclusive* congressional control regardless of its location. The only difference is that when the Indians are situated in a Territory the power of Congress over them is derived from that provision of the Constitution granting to the Federal Government control over its Territories and other property (sec. 3, Art. IV), *as well as* from the commerce clause; while after the Territory has become a State the power is dependent upon the latter clause alone. But this is of course ample. The admission of Minnesota to the Union no more repealed article 7 of the treaty of 1855 than the admission of Arizona and New Mexico repealed the Interstate Commerce Act in so far as it applies to territory wholly within their boundaries.

We do not contend of course that the enabling act of a State *may* not expressly or even impliedly repeal previous treaties or statutes relating to Indians. The point is that the mere creation of a State does not in and of itself do so. This was recognized in the two recent cases of *Ex parte Webb*, *supra*, and *United States* v. *Wright*, *supra*, wherein it was held that the admission of Oklahoma did not repeal the acts of 1895 and 1897, both of which prohibit the liquor

traffic with Indians. The *Webb* case contains the following significant passage (p. 683):

> The reservation of the authority of Congress to legislate in the future respecting the Indians residing within the new State is clearly supportable under the Federal Constitution (Art. I, sec. 8), which confers upon Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It has been repeatedly held by this court that under this clause traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress, although it be within the limits of a State. (*United States* v. *Holliday*, 3 Wall. 407, 418; *United States* v. *43 Gallons of Whisky*, 93 U. S. 188, 195, 197; *Dick* v. *United States*, 208 U. S. 340, and cases cited.)
>
> And it is as clearly consistent with the Constitution to maintain in force an existing act of Congress relating to such traffic and intercourse, so that it shall continue effective within the limits of the new State, as it is to reserve the right to enact new laws in the future upon the same subject matter.

See also *Donnelly* v. *United States* (228 U. S. 243); *United States* v. *Pelican* (232 U. S. 442).

Considerable emphasis was laid by the court below on the absence of any reservation of article 7 in the Minnesota enabling act. But such a reservation would have made no difference whatever from a constitutional standpoint. If Congress has not power over the subject matter, it may not acquire such

power by a reservation in the enabling act of a State; and, on the other hand, if power over the subject matter is possessed, it need not be preserved by express reservation. In other words, Congress can not reserve to itself any powers within a new State which it could not exercise within the limits of that State after its admission into the Union. This is made clear from the case of *Coyle* v. *Oklahoma* (221 U. S. 559), in which it was held that the Oklahoma enabling act (34 Stat. 267), in providing that the capital of the State should remain at Guthrie until the year 1913, ceased to be a limitation upon the power of the State after its admission. After reviewing and approving the case of *Pollard* v. *Hagan* (3 How. 212), the court said (p. 573):

> The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new State came into the Union *which would not be valid and effectual if the subject of congressional legislation after admission.*

Hence inasmuch as Congress could not have fixed the situs of the capital of Oklahoma after its admission to statehood, it was equally powerless to do so by a reservation in its enabling act. But the court was careful to point out the converse of the proposition (p. 574):

> It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, *or with Indian tribes situated within the limits of such new State*, or legislation touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, *but solely because the power of Congress extended to the subject*, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

To like effect are *Ex parte Webb*, *supra*, and *United States* v. *Sandoval* (231 U. S. 28), in the latter of which it was said (pp. 36–38):

> The indictment is founded upon the act of January 30, 1897 (29 Stat. 506, c. 109), as supplemented by section 2 of the act of June 20, 1910 (36 Stat. 557, c. 310), being the New Mexico enabling act. The first act makes it a punishable offense to introduce intoxicating liquor into the Indian country, and the second, in naming the conditions upon which New Mexico should be admitted into the Union, prescribed, in substance, that the lands then owned or occupied by the Pueblo Indians should be deemed and treated as Indian

country within the meaning of the first act and kindred legislation by Congress.

Whether without this legislative interpretation the first act would have included the pueblo lands we need not consider. The Territorial Supreme Court had but recently held that it did not include them (*United States* v. *Mares*, 14 N. M. 1), and Congress, evidently wishing to make sure of a different result in the future, expressly declared that it should include them. *That this was done in the enabling act and that the State was required to, and did, assent to it, as a condition to admission into the Union, in no wise affects the force of the congressional declaration, if only the subject be within the regulating power of Congress.*

The opinion below on the demurrer seems also to have been based on the ground that the continued application of article 7 to the ceded lands after the admission of Minnesota into the Union would result in a curtailment of that State's police powers within its own boundaries contrary to the doctrine of equality of statehood. Here again the principle of Federal control is lost sight of. The obvious answer is that *none* of the States possess any police power over commerce with the Indians, because that power is vested by the Constitution exclusively in Congress. Hence to deny the power to Minnesota was the rule and not the exception, and indeed had the power been granted to her, inequality would have been the result. The following quotation from the *Whisky* case, *supra*, in which a

treaty provision substantially identical to article 7 was upheld, is conclusive on this point (p. 197):

> It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident, for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without State lines. Based as it is exclusively on the Federal authority over the *subject matter*, there is no disturbance of the principle of State equality. (Italics are the court's.)

And to the same effect are the *Dick* and *Webb* cases, *supra*.

None of the cases relied on by the court below are controlling. In *United States* v. *McBratney* (104 U. S. 621) and *Draper* v. *United States* (164 U. S. 240) the question was whether the circuit courts had jurisdiction over a murder committed within the limits of an Indian reservation lying within a State, neither the defendant nor the deceased being Indians. In both cases the reservations involved were created prior to the admission of the Territories in which they were situated to statehood, and in the enabling

acts of these Territories there was no provision that Federal jurisdiction should continue to extend to these reservations. It was held that the State courts had exclusive jurisdiction over the crimes involved, even though committed on Indian reservations, since those reservations were within the boundaries of a State and therefore subject to its general police power *as long as no Indians were involved.* To have held otherwise would have been to deprive the States involved of the right to punish offenses committed by their own citizens within the territorial limits of their jurisdictions—a right inherent in every sovereign body—and inequality of statehood would have been the inevitable result. (*Draper* v. *United States*, *supra*, 247.) In these cases there was no Federal authority over the subject matter, the bare fact that the crime occurred on a reservation being insufficient since the reservation was not reserved as Federal jurisdiction in the enabling acts. In the present case, however, Federal authority over the subject matter (at least at the date of the admission of Minnesota into the Union) was complete, since there were Indian tribes within the ceded lands and the subject of the regulation was commerce. (*United States* v. *Holliday*, 3 Wall., 407, 416, 417.)

That the *McBratney* and *Draper* cases were based on the ground that they involved nothing over which the Federal Government has jurisdiction has been recently pointed out by this court in *Donnelly* v. *United States* (228 U. S. 243), wherein it was held that a circuit court has jurisdiction of a crime com-

mitted by a white man *against an Indian* on an Indian reservation. The court said (p. 271):

> Reference is made to the cases of *United States* v. *McBratney* (104 U. S. 621) and *Draper* v. *United States* (164 U. S. 240), where it was held, in effect, that the organization and admission of States qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the States the control of offenses committed by white people against whites, *in the absence of some law or treaty to the contrary*. In both cases, however, the question was reserved as to the effect of the admission of the State into the Union upon the Federal jurisdiction over crimes committed by or against the Indians themselves. (104 U. S. 624; 164 U. S. 247.) Upon full consideration we are satisfied that offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper* cases. This was in effect held, as to crimes committed by the Indians in the *Kagama* case (118 U. S. 375, 383), where the constitutionality of the second branch of section 9 of the act of March 3, 1885 (23 Stat. 385), was sustained upon the ground that the Indian tribes are the wards of the nation. This same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood.

And in *United States* v. *Sutton* [1] (215 U. S., 291), these two cases were thus distinguished from cases like the present one (p. 295):

> The offense charged was not one committed by a white man upon a white man, *United States* v. *McBratney* (104 U. S., 621; *Draper* v. *United States*, 164 U. S., 240), or by an Indian upon an Indian (*United States* v. *Celestine*, *ante*), but it was the introduction of liquor into an Indian reservation. In this offense neither race nor color are significant. The Indians, as wards of the Government, are the beneficiaries, but for their protection the prohibition is against all, white man and Indian alike.

Ward v. *Race Horse* (163 U. S. 504), which was regarded by the court below as controlling (R., 38), is another case where the Federal Government attempted to act where it had no authority over the subject matter. There it was provided by a treaty made in 1869 that the Bannock Indians should have the right to hunt upon the unoccupied lands of the United States, so long as game should be found thereon and peace subsist between the whites and the Indians. In 1890, Wyoming, the State in which these Indians were situated, was admitted to the Union (26 Stat. 22) by an act which contained no exception or reservation in favor of or for the benefit of the Indians, and subsequently the State legislature passed an act regulating the killing of game within

[1] This case was the latest decision of this court which was brought to the attention of the lower court, as appears from the opinion on the demurrer (R., 26).

the State. The petitioner (a Bannock Indian) was indicted for violating the provisions of this act, and sued out a writ of habeas corpus on the ground that the treaty deprived the State courts of jurisdiction over this offense. It was held that the admission of Wyoming to statehood carried with it the exclusive right to regulate the killing of game within its borders, which right was inconsistent with and necessarily repealed the provision of the treaty relied on, for otherwise inequality of statehood would result.

Here again there was no Federal control of the subject matter. Congress clearly could not have enacted, *after* Wyoming had become a State, that the Bannock Indians should have the right to hunt upon the unoccupied lands of the United States therein; and under the doctrine of *Coyle* v. *Oklahoma, supra,* what Congress can not do after statehood it can not do before statehood, so as to bind a State after its admission into the Union. On the other hand, Congress *could* have enacted article 7 *after* the admission of Minnesota to statehood (*United States* v. *43 Gallons of Whisky*), and could therefore do so *before* its admission (*United States* v. *Sandoval, supra*). *Ward* v. *Race Horse, supra,* is thus easily distinguishable from the case at bar.

In *Coyle* v. *Oklahoma, supra,* the *Race Horse* case was regarded by this court as one in which there was no Federal power over the subject matter. It was thus stated by the court (p. 576):

> In *Ward* v. *Race Horse, supra,* the necessary equality of the new State with the original

States is asserted and maintained against the claim that the police power of the State of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the State of Wyoming.

The case of *Friedman* v. *U. S. Express Company* (D. C. Ark.; 180 Fed. 1006), also relied on by the court below, was overruled by the Circuit Court of Appeals for the Eighth Circuit in *U. S. Express Co.* v. *Friedman* (191 Fed. 673). It was there held that the Oklahoma enabling act did not repeal the operation of the act of January 30, 1897 (29 Stat. 506), within that State. See also *Mosier* v. *United States* (C. C. A. 8th C., 198 Fed. 54); *Ex Parte Webb, supra; United States* v. *Wright, supra.*

(2) Article 7 of the treaty of 1855 was not repealed by the treaties of 1865 and 1867.

The pertinent facts as well as the provisions of the various treaties involved have already been set forth. To simplify the argument, however, they may be recapitulated in the following more general terms: By the treaty of 1855, the Indians ceded a tract of land (which is designated on the appended map as the "A" tract) to the United States, the latter agreeing in Article 7 of the said treaty that the laws forbidding the introduction, manufacture, etc., of liquor in the Indian country should continue to be in force "within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress." By the treaty of 1865, the Indians ceded to the United States certain scattered

tracts of land, which, by the treaty of 1855, had been reserved as a home separately for the Mississippi Band, and which are designated on the map as the "B" tracts. There was also reserved by this treaty as a home for the Mississippi Band *separately* another portion of the "A" tract (which is designated as the "C" tract), in which the town of Bemidji (the *locus in quo* in the present case) is now situated. By the treaty of 1867, the Mississippi Band *acting alone* re-ceded the "C" tract to the United States. In neither of the last two treaties was there any reference to article 7 of the treaty of 1855, nor to the subject matter of intoxicating liquors, and the question thus presented is whether article 7 continued to apply to tract "C" after the treaties of 1865 and 1867.

Little need be said in answer to the argument that the later treaties repealed article 7 of the earlier treaty in the generally accepted sense in which that word is used. There is nothing in the later treaties which is at all inconsistent with the prohibition; in fact they contain no reference whatever to the subject of intoxicating liquors. But it is said that this very omission is indicative of an intention on the part of the treaty-making power to cede tract "C" without restriction, and that when the Indian title thereto was extinguished by the recession under the treaty of 1867 there was nothing to preserve the application of the liquor laws. The obvious answer is that tract "C," being part of tract "A," was already protected by the ample provisions of article 7,

and hence it would have been the merest redundancy to repeat those provisions in the treaty of 1867.

No reason can be assigned why the treaty-making power should have wished to do away with article 7 as to tract "C." At that time the need for protection was as urgent there as at other points in tract "A," as to which there could be no repeal by the later treaties. Nor is it any answer to say that the State prohibition laws would have been sufficient protection to the Indians in tract "C," for the Federal Government has more than once refused to accept State protection for its wards as a substitute for its own. *United States* v. *Wright, supra*. In short, therefore, the argument for the implied repeal finds no more support in the policy of the Government toward the Indians than in the language of the treaties themselves.

But even if there be no basis for an implied repeal in the ordinary sense of the word, it is argued that when tract "C" was reconveyed (as is claimed) to the original grantors by the treaty of 1865, it was taken out of the operation of article 7, and that since that article was not *reenacted* in *the treaty of 1867*, which re-ceded tract "C" to the United States, there was no longer any prohibition applicable to that tract. This argument is apparently based upon the rule that a reconveyance to the original grantor of land to which a covenant relates has the effect of extinguishing the covenant. (*Silverman* v. *Loomis*, 104 Ill. 142; *Green* v. *Edwards*, 15 Tex. Civ. App. 382.) Conceding the soundness of this rule, there

are two reasons why it is inapplicable to the case at bar. First, the reconveyance of the "C" tract was not to the original grantors under the treaty of 1855, namely, the Mississippi, Pillager, and Lake Winnibigoshish Bands, *but to only one of them*, viz, the Mississippi Band;[1] and, second, even if the reconveyance may be regarded as to the original grantors, it is not to be supposed that the operation of treaties is governed by any such technical rule of property. (*Wilson* v. *Shaw*, 204 U. S. 24, 33.) A treaty is something more than a mere covenant; it is a contract between sovereign nations and by the Constitution is declared to be the supreme law of the land. Especially is this so of a provision like article 7, which is self-executing (*United States* v. *43 Gallons of Whisky*, *supra*, 196), and therefore equivalent to an act of Congress. (*Foster* v. *Neilson*, 2 Pet. 314.) If Congress had specifically provided that tract "A" should be Indian country in spite of its original cession and the consequent extinguishment of the Indian title thereto, no one would contend that the reconveyance of a part of that tract (tract "C"), or even the whole of it, to the Indians, would have any effect on the operation of the statute. As long as such a statute remained in force the land to which it related would obviously remain Indian

[1] The Indians who were parties to the treaty of 1855 are erroneously referred to in the bill as a *single tribe* of three bands, constituting all of the Chippewas. In reality (as this court judicially knows) there were Michigan, Lake Huron, Pembina, and Red Lake Chippewas, besides those executing the treaty of 1855, viz, the Mississippi, Pillager, and Lake Winnibigoshish Bands. Indeed it was the Red Lake and Pembina Chippewas who executed the treaty of 1863 (13 Stat. 668) involved in the *whisky* case, *supra*.

country regardless of who became its owner, and precisely the same thing is true of article 7, which is the equivalent of a statute.

(3) Article 7 of the treaty of 1855 had not expired at the time of the acts complained of in the bill by reason of any change in the character of the territory to which it applies.

We concede, of course, that article 7, though valid in the beginning and in its terms to continue "until otherwise provided by Congress," can not be upheld as a legitimate regulation when the subject matter upon which its validity depends is removed. Thus if there were no Indian wards within the ceded territory at the present time no one would be heard to say that the prohibition could be enforced. But on the other hand the justification for the prohibition rests preeminently with Congress, and if that body has not seen fit to repeal it, it is not to be condemned by the courts unless purely arbitrary. The proposition has been thus stated by this court in the recent case of *Perrin* v. *United States, supra*, in which a prohibition of indefinite duration in all respects similar to article 7 was upheld (p. 486):

> As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. Thus a prohibition like that now before us, if covering an entire State when there

> were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary, and a prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were *completely* emancipated from Federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the State. On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, *Congress is invested with a wide discretion*, and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

The question therefore is whether the territory which was ceded by the treaty of 1855 was in 1910 (the date of the acts complained of in the bill) so utterly lacking in Indian subject matter as to justify the condemnation of the prohibition as unreasonable.

The situation appears to have been substantially as follows: The ceded district (designated as tract "A" on the map), covers an area of more than 15,000 square miles. It has a population of 382,191 and includes nearly seven counties. Bemidji, the *locus in quo* in the present case, is a town of some 7,000 inhabitants and contains at least 12 saloons duly licensed under the internal revenue laws of the United States and of the State of Minnesota. The respondents are the respective proprietors of these saloons. On the other hand, the

district embraces two Indian reservations, namely, the White Earth and the Leech Lake, the combined areas of which are approximately 800,000 acres. Upon each of these reservations the Government maintains an Indian agency, an Indian superintendent, and other employees, as well as Indian schools. At the White Earth Agency, 5,600 Indians are carried on the annuity rolls, and at the Leech Lake Agency 1,750 Indians are so carried. Both reservations are in process of allotment under the acts of February 8, 1887 (24 Stat. 388), January 14, 1889 (25 Stat. 642), and April 28, 1904 (33 Stat. 539), all of which provide (the two later acts by reference to the act of 1887) that the title to lands allotted thereunder shall remain in the United States in trust for the various allottees for a period of 25 years. (See Rep. Com. of Ind. Aff. (1912), pp. 101, 102). Under the act of 1887 all allottees became citizens of the United States and the States in which they resided, upon the receipt of trust patents. (*Matter of Heff*, 197 U. S. 488.) By the act of May 8, 1906 (34 Stat. 182), this act was amended by a provision to the effect that citizenship should be postponed till the expiration of the trust period and the issuance of a patent in fee to the allotted lands. This amendment probably applies only to trust patents issued after the date of its passage. By the act of June 21, 1906 (34 Stat. 325, 353), as amended by the act of March 1 1907 (34 Stat. 1015, 1034), commonly known as the "Clapp amendment," all restrictions as to sale and

incumbrance on allotments in the White Earth Reservation made to *mixed bloods* either before or after the passage of the amendment were removed, and all trust patents were given the effect of patents in fee simple. As to full bloods, it was provided (as in the act of May 8, 1906, *supra*) that such restrictions could be removed by the Secretary of the Interior when he became satisfied that any such allottees were competent to handle their own affairs.

Under this state of the law there are three classes of allottees within tract "A," as follows:

> (1) Full blooded White Earth and all Leech Lake holders of trust patents under the acts of 1887, 1889, and 1904, issued prior to the act of May 8, 1906. These allottees are probably citizens of the United States and Minnesota, but can not alienate their lands, the fee being in the United States.
>
> (2) Full blooded White Earth and all Leech Lake holders of trust patents under the acts of 1887, 1889, and 1904, issued after the act of May 8, 1906. These allottees are not citizens of the United States or Minnesota, save such as may have received patents in fee from the Secretary of the Interior as being competent to manage their own affairs.
>
> (3) Mixed blood White Earth allottees under the acts of 1887, 1889, and 1904, irrespective of the time when the patents were issued. These allottees are citizens of the United States and Minnesota and may alienate their lands without restriction. Their number is uncertain and will continue to be

> so until this court judicially defines the meaning of the term "mixed blood" in the Clapp amendment. Three cases requiring such a definition have recently been argued here. (Nos. 873, 874, and 875.)

It thus appears that the first class of allottees may be citizens but not fee simple allottees; the second class are neither; and the third class are both. As to the first class, there can be no doubt that, even if citizens, they must be regarded, for the purposes of this case, as in a condition of wardship and therefore subject to Federal supervision, because the trust period for which their lands were held by the Government could not have expired at the time of the acts complained of in the bill.

> *United States* v. *Pelican, supra.*
> *Matter of Rickert* (188 U. S. 432, 437).
> *McKay* v. *Kalyton* (204 U. S. 458, 466, 468).
> *Couture, Jr.*, v. *United States* (207 U. S. 581).
> *United States* v. *Celestine* (215 U. S. 287, 290, 291).
> *Tiger* v. *Western Investment Co.* (221 U. S. 286).
> *Hallowell* v. *United States* (221 U. S., 312).

In *Perrin* v. *United States, supra,* in which a treaty provision covering territory which had been allotted under the act of 1887 was sustained, it was said pertinently to the question at hand (p. 487):

> The conditions justifying the prohibition remain substantially the same as when it was adopted. *The trust period has not expired,*

the tribal relation has not been dissolved, and the wardship of the Indians has not been terminated.

As to the second class their status as wards can not be doubted, the express purpose of the act of June 21, 1906, having been to postpone their emancipation. See *United States* v. *Celestine, supra*, 291.

As to the third class, their status as emancipated Indians is not concluded by reason of their citizenship or their fee-simple allotments, but necessarily depends upon the further question whether they are recognized as a dependent people by the executive or legislative branches of the Government. (*United States* v. *Sandoval, supra*.) But since their number as wards or otherwise is in any event comparatively small and as yet undetermined, it is sufficient to say that of the 8,281 Indians who had received allotments within tract "A" up to the year 1912 (Rep. Com'r of Ind. Aff. (1912), p. 101, 102), 7,483 were at that time regarded by the Interior Department as under Federal supervision. (Ibid, p. 87.) Approximately this number (7,350) are carried on the annuities rolls of the two reservations.

The remaining question, then, is whether the presence of this number of Indian wards within the boundaries of tract "A" is sufficient to justify the continued existence of a prohibition covering its entire area. True the lands actually occupied by the Indians (800,000 acres) are only a small proportion of the total area of tract "A" (15,000 square miles), but this

court has recognized the necessity of extending such a prohibition to territory adjacent to the actual danger zone, and the wisdom of such legislation, when considered in relation to its purpose, can not be doubted. Thus in *United States* v. *43 Gallons of Whisky, supra,* it was said (p. 195):

> If liquor is injurious to them (the Indians) inside of a reservation, it is equally so outside of it; and why can not Congress forbid its introduction into a place near by, which they would be likely to frequent? It is easy to see that the love of liquor would tempt them to stray beyond their borders to obtain it; and that bad white men, knowing this, would carry on the traffic in adjoining localities rather than venture upon forbidden ground. If Congress has the power, as the case we have last cited decides, to punish the sale of liquor anywhere to an individual member of an Indian tribe, why can not it also subject to forfeiture liquor introduced for an unlawful purpose into territory in proximity to that where the Indians live? There is no reason for the distinction; and, as there can be no divided authority on the subject, our duty to them, our regard for their material and moral well-being, would require us to impose further legislative restrictions should country adjacent to their reservations be used to carry on the liquor traffic with them.

But the Indians actually within tract "A" are by no means the only ones involved. An examination of the appended map discloses that the large Red

Lake Reservation, covering an area of 543,528 acres and containing 1,436 Indians, is situated not more than fifteen miles from tract "A" and not more than thirty miles from Bemidji itself. Every one of these Indians is in a condition of wardship. (Rep. Com'r of Ind. Aff. (1912), p. 87.) About the same distance from tract "A" to the east lies the Fond du Lac Reservation covering an area of approximately 100,000 acres and containing 962 Indians, all of whom are likewise under Federal supervision. (Rep. Com'r of Ind. Aff. (1912), p. 87.) It is true that this reservation lies within tract "E," as to which there is a separate prohibition (Art. 7 of the treaty of September 30, 1854, 10 Stat. 1109); but this would be small protection if tract "A," which is easily accessible, should be opened to the liquor traffic.

It is moreover alleged in the answer that the Indians in hunting, trapping, and for business and pleasure, are wont to visit the various cities and towns within the prohibition area, and among them Bemidji (R., 69) which, as the map so clearly discloses, is flanked on three sides by Indian Reservations. And while this allegation is somewhat inconsistent with the averments of the bill, it must prevail for the purposes of this appeal, since the bill waived an answer under oath (R., 64), and the case was submitted on the pleadings (R., 72). (*Peoples' Bank* v. *Gilson* (C. C. A. 8th C.), 161 Fed. 286, 291.) The bill and answer are likewise in conflict as to the extent to which the Government has sought to prevent the liquor traffic

within tract "A" since its cession in 1855. But it appears from the answer (which prevails here) that some effort has been made in the direction of prohibition since 1905 (R., 69, 70); and this court judicially knows that in the same year Attorney General (afterwards Mr. Justice) Moody held that article 7 was still in force within tract "A." (25 Ops. A. G. 416.) It also judicially knows that in 1911 President Taft recommended to Congress in a special message that the article be amended so as to cover only that part of tract "A" which is adjacent to the White Earth and Leech Lake Reservations (Sen. Doc., 824, 61st Cong., 3d sess.), and that Congress failed to act in accordance with the recommendation, thus plainly indicating that the article was not only alive, but that that body intended that it should continue in its original form and vigor throughout the entire tract. Admitting, however, that the Government has been extremely lax in the matter of enforcement, it by no means follows that article 7 may be regarded as a dead letter, since popular disregard of a law can not work its repeal. (*Georgia Rd., etc., Co.* v. *Walker*, 87 Ga. 204.)

The bill places considerable emphasis upon an alleged admission by certain Government officials that neither the provisions of article 7 nor of any other treaty are in force in a strip of land 15 miles in width lying between the Red Lake Reservation and Bedmidji (R., 63), and seems to contain a suggestion of an estoppel arising therefrom against the

enforcement of the article within tract "A." While this condition of affairs is admitted in the answer (R., 69), this court will take judicial notice that the 15-mile strip referred to is not and has never been covered by any treaty provision, and that it lies entirely outside of the northernmost boundaries of tract "A." Hence the so-called admission of the Government officials that this area is "wet" is of course irrelevant to any question involved in the present case. The appended map clearly discloses the true situation.

Finally the need for protection can not be overemphasized. In 1912 more than 31 per cent of the Indians on the Leech Lake Reservation and more than 17 per cent of those on the White Earth Reservation were estimated as having tuberculosis, while over 19 per cent at Leech Lake and 26 per cent at White Earth were estimated as afflicted with trachoma. (Rep. Com'r of Ind. Aff. (1912), p. 171.) Liquor is destructive enough to Indians in ordinary health, but it is death itself to them when they are already weakened by the ravages of disease. Moreover, the State prohibition laws are inadequate to meet the situation. This clearly appears from the following extract from the latest report (1912) of the Commissioner of Indian Affairs (p. 47):

> The situation in Minnesota, so far as our operations are concerned, changed but little. The condition among the Indians has become worse, and reports indicate that the Indians have but little difficulty in obtaining liquor.

> As about 75 per cent of the Indians in that State are citizens, and operations under the provisions contained in the various treaties with the Chippewa Indians have been held in abeyance pending the final determination of the case of Gearlds et al. *v.* Johnson et al., our only hope lies in the enforcement of the State law. Our work along this line, however, has been to a certain extent hampered by the passage of a law by the State declaring it to be a misdemeanor to employ a decoy.

Bearing in mind, therefore, that the question is preeminently one for Congress, that that body has not acted, that there are upwards of 7,000 Indian *wards* living in the ceded district entitled to and requiring Federal protection, and that these Indians are accustomed to travel more or less over its *entire* area, there appears to be no sufficient ground upon which the prohibition of article 7 can be condemned by this court as arbitrary.

CONCLUSION.

It is respectfully submitted that this court has jurisdiction to hear this appeal; that article 7 of the treaty of 1855 was in force at the time of the acts complained of in the bill, and that the judgment of the Circuit Court should be reversed.

WILLIAM WALLACE, Jr.,
Assistant Attorney General.

APRIL, 1914.

APPENDIX.

KEY TO MAP ON OPPOSITE PAGE.

A (bounded by red border) represents tract of land ceded by the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa Indians to the United States under the treaty of February 22, 1855 (10 Stat. 1165).

B (solid green) represents scattered tracts ceded by the same bands to the United States under the treaty of March 20, 1865 (13 Stat. 693).

C (bounded by blue border) represents tract set aside as a home for the Mississippi Band under the treaty of 1865, *supra*, and re-ceded to the United States *by that band alone* under the treaty of March 19, 1867 (16 Stat. 719).

D (bounded by yellow border) represents tract ceded by the Red Lake and Pembina Bands of Chippewas to the United States under the treaty of October 2, 1863 (13 Stat. 667). This is the treaty which was upheld by this court in *United States* v. *43 Gallons of Whisky*, *supra*.

E (bounded by green border) represents tract ceded by the Lake Superior Band of Chippewas to the United States under the treaty of September 30, 1854 (10 Stat. 1109).

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